BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONNA K. SANDERS Claimant	)	
VS.	)	Docket No. 1,016,336
BOMBARDIER AEROSPACE/LEARJET Self-Insured Respondent	)	

ORDER

Respondent requested review of the August 12, 2005 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on December 13, 2005.

APPEARANCES

Dale V. Slape, of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that neither disputes the ALJ's decision to award claimant a 7 percent functional impairment to the whole body as a result of her work-related injury. And the parties agreed that there was a mathmatical error in the Award and that when corrected, the ALJ's Award should have been for a 55.5 percent permanent partial general (work) disability rather than 54.5 percent. Finally, the parties also agreed that there was no dispute over the pre-existing 6 percent whole body functional impairment found by the ALJ. Rather, the sole focus of this appeal is on the task and wage loss components of the claimant's work disability under K.S.A. 44-510e(a).

ISSUES

The ALJ awarded claimant 54.5 percent work disability[1] based upon a 100 percent actual wage loss and a 23 percent task loss, less 6 percent preexisting impairment. In making these findings, the ALJ disregarded Dr. Murati's task loss opinion (85 percent) in favor of that offered by Dr. Fevurly (23 percent). And he disregarded the opinions

[1] As noted in the stipulations, the parties agreed that the 54.5 percent was a computational error and it should have been 55.5 percent.

expressed by Dr. Mills and Dr. Morris as neither of those physicians examined claimant for the injuries that are the subject of this litigation.

The respondent requests review of the nature and extent of claimant's disability, specifically the extent of her work disability. Respondent argues claimant has not made a good faith effort to find appropriate post-injury employment. Accordingly, respondent urges the Board to impute a wage to claimant based upon Dan Zumalt's testimony, thereby lowering her wage loss to 61 percent. In addition, respondent concedes it has no objection to the 23 percent task loss found by the ALJ. And when those two components are averaged, respondent suggests the Board should modify the ALJ's Award to a 42 percent work disability.

Claimant contends the ALJ's Award should be affirmed in all but one respect. Claimant believes the task loss opinions expressed by Dr. Murati, based upon the vocational analysis offered by Mr. Hardin, are more persuasive than those expressed by Dr. Fevurly. Thus, based upon Dr. Murati's opinion, which claimant urges the Board to accept, claimant's task loss is 85 percent. When averaged with her 100 percent task loss, the Board should modify the ALJ's Award to a 92.5 percent work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ set forth the facts in some detail and they will not be reiterated herein except as necessary to explain the Board's findings.

Claimant is entitled to a permanent partial general disability under K.S.A. 44-510e(a) as her impairment does not fall within the schedule of injuries set forth by K.S.A. 44-510d. Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the

> human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

That statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[4]

The ALJ concluded claimant had exhibited a good faith effort in her attempt to find post-injury employment. Respondent had argued that claimant was truly not putting forth a genuine effort to find employment as she was continuing to apply at locations where she had been previously turned down. In response to this argument, the ALJ stated:

> This is how a person finds a job. When you're looking for work, you keep trying to find a job. You don't give up on one potential employer after one attempt. You keep returning and trying to find employment until you eventually become employed.[5]

Thus, he refused to impute a wage to claimant and used claimant's actual wage lossof 100 percent in calculating her work disability under K.S.A. 44-510d(e)(a).

The Board has considered respondent's argument as well as the ALJ's reasoning and believes his finding should not be disturbed. The Board belives the ALJ is correct in his analysis that repetitive efforts are, in this instance, indicative of a genuine effort and will

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Id.* at 320.

[5] ALJ Award (Aug. 12, 2005) at 6.

normally increase the likelihood of success. Claimant provided an exhaustive list of job contacts which spans from July 30, 2004, just after she was terminated from respondent's employ, to February 21, 2005, the day of her regular hearing. She continued to regularly check back with many of the potential employers in addition to other new employers. According to her list, she applied for not just selected jobs, but at the larger employers she applied for any open position. While many of the employers she was applying with are those who are involved in the airline industry and undoubtedly have jobs that are similar to the one she held with respondent, claimant explained that she felt she could do the work as long as her overhead work was limited. Thus, her applications at those empoyers is not necessarily suspect. Looking at the record as a whole, the Board finds that the ALJ's finding of good faith is well supported and therefore, claimant's actual wage loss is to be used in computing her work disability under K.S.A. 44-510e(a).

Turning now to the task loss component of the work disability computation, only claimant takes issue with the ALJ's 23 percent task loss finding. This 23 percent is based upon the opinions of Dr. Fevurly, who the ALJ believed was more credible than Dr. Murati, who suggested claimant bore an 85 percent task loss.

Interwoven in this task loss dispute and the opinions expressed by all of the physicians, was respondent's argument that claimant had, by virtue or an earlier injury, lost the ability to perform a number of tasks, and that those tasks that had already been "lost" should not be included within the task loss used to compute her work disability from the injury at issue in this claim.

The ALJ rejected this argument as does the Board. There is no dispute that after her release from treatment following her 1999 injury claimant returned to work for respondent at her regular job. She continued to perform duties that the physicians agree exceed the restrictions that were imposed upon her following that injury. Because claimant performed those duties thus exceeding her restrictions, respondent cannot use those restrictions as a shield or defense against her subsequent claim for injuries.[6] The ALJ and the Board should only consider those opinions that take into consideration all of the tasks claimant had performed in the last 15 years of her working career, as required by K.S.A. 44-510e(a). There is no legal authority for disregarding those tasks that claimant should not have performed for respondent while working but due to her job requirements, did, in fact, perform.

With this frame of reference, only Dr. Fevurly and Dr. Murati's task loss opinions are viable as they were the only two physicians who actually examined claimant following her most recent injury and to consider the entirety of claimant's tasks over the past 15 years. The ALJ considered Dr. Fevurly's opinion more credible over that offered by Dr. Murati. He seemed to believe that Dr. Murati merely adopted the analysis provided by claimant's

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[6] See *Maberry vs. Rubbermaid Specialty Products*, No. 186,053, 1997 WL 703739 (Kan. WCAB Oct. 30, 1997).

vocational expert, Jerry Hardin, and did no independent analysis of claimant's past task history. Thus, he was not persuaded by Dr. Murati's opinions.

While the Board has, in the past, been critical of such wholesale adoption of a vocational analysis, the evidence suggests that did not occur in this case. Dr. Murati testified that he reviewed the list in advance of the deposition and concluded that Mr. Hardin's analysis was consistent with his own.

The primary difference between the task loss opinions expressed by Drs. Murati and Fevurly stems from Dr. Fevurly's lack of restrictions for repetitive grasping activities. Dr. Fevurly suspected claimant had bilateral carpal tunnel, a condition that Dr. Murati has definitively diagnosed. But Dr. Fevurly explained that, due to claimant's nonspecific findings, he was unwilling to include work restrictions that limit grasping. Yet, the FCE performed at respondent's request and which led to claimant's ultimate termination from her job, indicated claimant had difficulty with such activities and should be limited in performing that maneuver. Dr. Murati found that restriction to be appropriate and included it within his permanent restrictions. And when those restrictions were applied to the list of tasks, the result was an 85 percent task loss.

The Board has considered both task loss analyses and finds no reason to accept one over the other. Thus, the two opinions, 23 percent and 85 percent will be averaged and the result is a 54 percent task loss. The ALJ's Award is modified to reflect a 54 percent task loss. Likewise, the Award is further modified to reflect a 77 percent work disability. The 77 percent work disability is reduced by 6 percent pursuant to K.S.A 44-501(c), leaving a net result of 71 percent.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated August 12, 2005, is affirmed in part and modified in part as follows:

The claimant is entitled to permanent partial disability compensation at the rate of $449 per week not to exceed $100,000 for a 71 percent work disability.

As of December 29, 2005 there would be due and owing to the claimant 74.29 weeks of permanent partial disability compensation at the rate of $449 per week in the sum of $33,356.21 for a total due and owing of $33,356.21, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $66,643.79 shall be paid at the rate of $449 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of December, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale Slape, Attorney for Claimant
Vincent Burnett, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director